Supreme Court, U.S.
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NO. 93-1238

**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1993

MARY NAGLE, *et al.*,
*Petitioners*

v.

DAVID E. ALSPACH, *et al.*,
*Respondents*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

**RESPONDENTS' BRIEF IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Should the Court grant certiorari to review a routine application of Rule 38 of the Federal Rules of Appellate Procedure, awarding damages for pursuing a frivolous appeal in which the appellants challenged only two of the four independent and adequate grounds relied upon by the District Court?

2. Should the Court grant certiorari to review alleged errors in the granting of summary judgment on negligence and professional malpractice claims, involving no important issues of federal law and no conflicts in the decisions of the lower courts?

## LIST OF PARTIES

The parties to the proceedings below were as follows:

(a) The Plaintiffs were Mary Nagle; James A. Shertzer; S. Enola Gochenauer; Alan Shaffer; Eugene C. Adams; George F. Wilt; Michael E. Wilt; Daniel H. Shertzer; and James A. Shertzer and Daniel H. Shertzer, Executors under the Will of Elva A. Shertzer, deceased. They are Petitioners before this Court.

(b) The Defendants were David E. Alspach, Trustee in Bankruptcy of Rimar Manufacturing, Inc.; Jacques H. Geisenberger, Jr.; Marvin Krasny; Adelman & Lavine; Adelman, Lavine, Krasny, Gold & Levin; and Rimar Manufacturing, Inc.[1] They are Respondents before this Court.

(c) Certain additional parties were joined as Third-Party Defendants, but the claims against them were voluntarily dismissed in the District Court. They did not participate in any subsequent proceedings and are not named as parties before this Court in the Petition for Certiorari. They are: Paul R. Rosen; Spector, Cohen, Hunt & Rosen, P.C.; Spector Cohen, Gadon & Rosen; Alan S. Fellheimer; Fellheimer, Krakower & Eichen; Fellheimer, Eichen & Goodman; and Robert I. Martin.

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[1] Rimar Manufacturing, Inc., was a nominal respondent. It has no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates.

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**RESPONDENTS' BRIEF IN OPPOSITION**

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## CITATIONS TO OPINIONS DELIVERED IN THE COURTS BELOW

Respondents adopt the statement on page 3 of the Petition for Writ of Certiorari, but note that the opinion of the United States Court of Appeals for the Third Circuit is now published. *Nagle v. Alspach*, 8 F.3d 141 (3d Cir. 1993).

## STATEMENT OF THE CASE

### I. PROCEEDINGS IN THE DISTRICT COURT

Petitioners are shareholders of Rimar Manufacturing, Inc. ("Rimar"), a corporation that in 1976 filed for bankruptcy under the then-effective provisions of chapter XI of the Bankruptcy Act of 1898. They brought this action, purportedly as a derivative suit on behalf of Rimar, against Rimar's Trustee in Bankruptcy, David E. Alspach, and his counsel, now Respondents before this Court. The Petitioners alleged that the Trustee and his counsel had been negligent in failing to assert on a timely basis a claim that Rimar allegedly had against its former lender, Commercial Credit Business Loans, Inc. ("CCBL"). They sought judgment, on behalf of Rimar, in the amount that allegedly would have been recovered from CCBL if the Trustee and his counsel had timely asserted and pursued the claim.[2] The action was brought on January 2, 1985, in the Court of Common Pleas of Philadelphia County, Pennsylvania, and was

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[2] Petitioners now assert that they were seeking recovery only against counsel for the Trustee, and that the Trustee was sued only because he was a necessary party. In fact, their Complaint alleged that the Trustee, as well as his counsel, was negligent, and it sought judgment against both the Trustee and his counsel.

removed by Respondents to the United States District Court for the Eastern District of Pennsylvania, pursuant to 28 U.S.C. § 1452.

On October 20, 1992, the District Court granted summary judgment in favor of Respondents and against Petitioners. The District Court expressly set forth in its opinion four separate and independent grounds for its grant of summary j .dgment, as follows:

(1) **Statute of Limitations.** The District Court held that the Petitioners' suit was time-barred under the two-year Pennsylvania statute of limitations for negligence and professional malpractice. *See Garcia v. Community Leg. Servs. Corp.*, 524 A.2d 980 (Pa. Super. 1987), *appeal denied*, 538 A.2d 876 (Pa. 1988). The District Court determined that the claim against the Trustee and his counsel for failing to bring suit against CCBL accrued on January 12, 1982, the date that the statute of limitations on Rimar's claim against CCBL expired. Thus, the District Court concluded, the Petitioners' suit against the Trustee and his counsel had to have been brought within two years after that date -- i.e., by January 12, 1984. After reviewing applicable Pennsylvania law, the District Court held that the statute of limitations on the claim against the Trustee and his counsel was not tolled by the pendency of related proceedings. Therefore, the District Court held, since the present action was not brought until almost a full year after January 12, 1984, the action was subject to dismissal under the statute of limitations. (Pet. 23a-29a.)

(2) **Issue Preclusion – No Damage.** As separate and independent grounds for summary judgment, the District Court held that prior determinations in related bankruptcy proceedings acted as collateral estoppel on two different elements of the Petitioners' claims against the Trustee and his counsel. Initially, the District Court held that Petitioners were precluded from relitigating the issue

of whether Rimar had suffered any damage as a result of any failure of the Trustee and his counsel to bring a timely suit against CCBL. This issue had been fully and finally litigated in *two* prior proceedings. First, the Trustee and his counsel had reached a settlement of Rimar's claim against CCBL and had, after notice and motion, obtained approval of the settlement from the Bankruptcy Court. (Pet. 33a-35a.) Petitioners did not appeal this approval. (Pet. 29a.) The Bankruptcy Court's approval of the settlement was, according to the District Court, "a judicial determination that the settlement was both reasonable and a benefit to the estate" of the bankrupt corporation and that the settlement thus "eliminated any damage which might have resulted from [the Trustee's] failure to file the Rimar estate's claim against CCBL before expiration of the statute of limitations." (Pet. 34a.)

Second, after approval of the settlement and during the pendency of the present action, the same shareholders filed an application in the Bankruptcy Court for the removal of the Trustee and his counsel, asserting as grounds that they had failed to timely commence and prosecute the claim against CCBL. The Bankruptcy Court, after a hearing, denied the application, and on appeal the District Court affirmed.[3] As the District Court noted in the present case, its opinion affirming the Bankruptcy Court's refusal to remove the Trustee and its counsel once again examined the question of damage to the Rimar estate and concluded that a reasonable settlement of Rimar's claim against CCBL had been reached. (Pet. 35a.) Thus, the District Court held, there had been judicial

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[3] The District Court's opinion affirming the Bankruptcy Court's refusal to remove the Trustee and his counsel, *In re Rimar Mfg., Inc.*, No. 88-9048 (E.D. Pa. Aug. 3, 1990), is set out at Pet. 41a-48a. On further appeal, the United States Court of Appeals for the Third Circuit affirmed. *In re Rimar Mfg., Inc.*, 928 F.2d 396 (3d Cir. 1991).

determinations on two prior occasions that a reasonable settlement with CCBL had avoided any damage to the estate from any failure of the Trustee and his counsel to institute a timely suit against CCBL. These determinations acted as collateral estoppel to preclude relitigation of the issue of damage caused by the Respondents' alleged negligence. (Pet. 33a-38a.)

(3) **Issue Preclusion – No Negligence.** The second prior judicial finding which acted as collateral estoppel was the determination that the Trustee and his counsel had not been negligent in their handling of the CCBL claim. In its earlier opinion affirming the Bankruptcy Court's refusal to remove the Trustee and his counsel, the District Court had held that the Trustee had "pursued the claims of the estate diligently and sought to minimize expenses while attempting to collect and preserve assets of the estate." (Pet. 35a-36a.)[4] This finding, the District Court concluded, precluded relitigation of the issue of the negligence of the Trustee and his counsel:

> Consequently, we conclude that the defendants are correct in their contention that the primary liability issue on this case, *i.e.*, whether the Trustee and/or his counsel breached their duty of care to the Rimar estate by failing to timely file an action against CCBL was decided in their favor in a prior action. [Pet. 37a.]

Thus, the District Court held that two separate issues that were each essential elements in the Petitioners' case -- the damage to Rimar and the negligence of the Trustee and his counsel -- were the subject

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[4] The quoted language appeared at page 9 of the unpublished opinion in *In re Rimar Manufacturing, Inc.* (Pet. 48a).

of issue preclusion, requiring the entry of summary judgment against Petitioners.

**(4) Lack of Standing.** Finally, the District Court held that Petitioners lacked standing to assert their claims on behalf of Rimar. In reply to the principle that a cause of action of a bankrupt corporation belongs only to its Trustee and may not be asserted derivatively by the shareholders of the corporation,[5] the Petitioners argued that an exception applied where the Trustee has "abandoned" the cause of action. Petitioners contended that the Trustee here had "constructively" abandoned the cause of action against himself and his counsel by asserting, as a defense in the present case, that the Petitioners' claims of negligence were without merit. The District Court rejected Petitioners' contention. It held that since the claims against the Trustee and his counsel *were* without merit, the Petitioners could not make a "constructive abandonment" argument to avoid the rule against shareholder derivative suits against a bankrupt corporation. (Pet. 38a-40a.)

For these four separate and independent reasons, the District Court granted summary judgment in Respondents' favor.

## II. PROCEEDINGS IN THE COURT OF APPEALS

Petitioners appealed to the United States Court of Appeals for the Third Circuit. In their supporting brief, however, Petitioners addressed only the first two grounds noted above for the District

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[5] *See, e.g., John L. Motley Assocs. v. Rumbaugh*, 97 Bankr. 182 (E.D. Pa. 1989); *Jefferson v. Mississippi Gulf Coast YMCA, Inc.*, 73 B.R. 179, 181-82 (S.D. Miss. 1986); *In re Couch*, 43 B.R. 56, 59 (Bankr. E.D. Ark. 1984); *Nagle v. Commercial Credit Business Loans, Inc.*, 102 F.R.D. 27 (E.D. Pa. 1983) (citing *Pepper v. Litton*, 308 U.S. 295, 307 (1939).

Court's judgment. They did not list as an issue presented, nor did they set forth any argument on, the question of whether they were collaterally estopped from relitigating the negligence of the Trustee and his counsel and the question of whether they lacked standing to sue derivatively on behalf of Rimar. In the Brief for Appellees filed by Respondents, the principal argument was that by failing to challenge two of the four independent bases for the District Court's judgment, Petitioners had waived these issues, and the judgment must therefore be affirmed. Respondents did not file a reply brief.

By letter dated July 16, 1993, the Court of Appeals directed the parties to file letter briefs addressing, inter alia, whether damages should be awarded to Respondents under Rule 38 of the Federal Rules of Appellate Procedure, which authorizes such an award if an appeal is determined to be "frivolous." Respondents were also directed to submit documentary data to support the amount of any damages requested. The letter briefs were to be submitted within ten days. Petitioners were granted five days thereafter within which to reply to Respondents' letter brief. (Pet. 16a-17a.)

The parties' respective letter briefs were filed on July 26, 1993. Petitioners' letter brief set forth the reasons why they did not regard their appeal as frivolous and why, even if it was frivolous, they believed that Rule 38 damages should not be awarded. Their letter brief did not, however, assert any objection to the procedure set forth in the Court's July 16 letter. Respondents, in their letter brief, maintained that the appeal was frivolous for the same reasons set forth in their previously submitted brief on the merits -- primarily that Petitioners had waived two of the four bases for the District Court's judgment by failing to address them on appeal. Respondents also submitted affidavits setting forth their counsel fees and costs for which they sought recovery under Rule 38.

On the same day, Petitioners filed a "Motion for Enlargement of Time," the *entire text* of which was as follows:

> Daniel H. Shertzer, Esquire, attorney for Appellants in the above matter, respectfully moves Your Honorable Court to extend the time for filing a reply to Appellee's Request for Rule 38 Damages, should he desire to do so until August 4, 1993, for the reason that he is on vacation until August 2, 1993, and will not have an opportunity to review Appellee's brief until then.

The Motion did not give any other basis for seeking additional time, did not request more than a two-day extension, did not request an evidentiary hearing, and did not otherwise object to the procedure employed by the Court of Appeals. By letter dated July 29, 1993, the Court notified counsel that the Motion for Enlargement of Time was denied. (Pet. 15a.)

Petitioners' reply, dated August 2, 1993, first addressed the arguments made by Respondents that the appeal was frivolous. Turning to the counsel fees and costs sought by Respondents, Petitioners did not contest the accuracy of the amounts claimed. They did object, however, to the fact that one of the counsel for Respondents had submitted a schedule of all of his counsel fees and costs since the beginning of the case, not just those incurred on the appeal.[6]

On October 25, 1993, the Court of Appeals filed its opinion disposing of both the appeal and the Rule 38 issue. *Nagle v.*

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[6] On August 4, 1993, Petitioners submitted a supplement to their August 2 reply, adding a paragraph which they stated had been inadvertently omitted from their reply.

*Alspach*, 8 F.3d 141 (3d Cir. 1993). On the appeal, the Court concluded that because Petitioners had failed to address in their brief two of the four grounds on which the District Court had based its judgment, any challenge to those grounds had been waived, and the judgment must therefore be affirmed. *Id.* at 143-44 (Pet. 4a-6a). Turning to Rule 38, the Court concluded that Petitioners had failed to set forth any sufficient excuse for their failure to address two of the four grounds supporting the judgment below. This unexcused failure rendered the appeal frivolous:

> [A]ppellants challenged only two of the four conclusions asserted by the district court to support its summary judgment for defendants. Hence, even if we held for appellants on both asserted allegations of error, two unchallenged bases would remain, and we would still affirm the district court's judgment. This appeal therefore never had any possibility of resulting in a reversal and is frivolous.

*Id.* at 145 (Pet. 9a).

The Court was careful to note its reluctance to award Rule 38 damages, in order to avoid a chilling effect on zealous advocacy and innovative legal arguments. The Court concluded, however, that no such concern applied to this appeal:

> [W]e move with caution and will not label an appeal frivolous unless it lacks colorable support or is wholly without merit. Here, however, there was no possibility of success, and it is patently unfair to allow appellees who have been damaged financially by a frivolous appeal to go uncompensated. We see no chilling effect whatsoever in requiring an attorney, once a proper decision to appeal has been made, to be professional and diligent in prosecuting it.

*Id.* (Pet. 10a).

Finally, the Court held that damages should be imposed against Petitioners' counsel only, and not on Petitioners themselves. *Id.* at 145-46 (Pet. 10a-11a). The Court therefore awarded damages for the fees and costs incurred by Respondents' counsel on the appeal. *Id.* at 146 (Pet. 11a). It agreed with Petitioners, however, that fees and costs incurred prior to the appeal should not be awarded under Rule 38. *Id.* at 144 n.2 (Pet. 7a).

## SUMMARY OF ARGUMENT

Petitioners' principal argument -- that Rule 38 sanctions were imposed without due process -- has not been preserved. In the *two* opportunities that they were granted to address the Court of Appeals on the Rule 38 issue, their opening letter brief and their reply to Respondents' letter brief, Petitioners never requested any further hearing, never maintained that the schedule for the submission of letter briefs was unreasonable or otherwise unconstitutional, and never asserted any other objection to the procedure employed by the Court of Appeals. Indeed, the only procedural request made by Petitioners, their Motion for Enlargement of Time to file their reply, was made not on due process grounds but on the grounds that Petitioners' counsel was planning to go on vacation.

Even if the due process issue had been preserved, it does not warrant a grant of certiorari. Petitioners do not point to any conflict in the lower courts on the proper application of Rule 38. Nor do Petitioners present any particularly important issue of federal law that merits this Court's intervention. Despite Petitioners' citation of the Fifth Amendment, they do not raise any substantial issues that

would question the constitutional validity of the procedures used by the Court of Appeals.

Petitioners likewise present no substantial basis for reviewing the merits of the decision by the Court of Appeals to affirm the summary judgment entered by the District Court. That decision involves the interpretation of a *state-law* statute of limitations and the routine application of established principles of issue preclusion to a particularized set of facts. Again, Petitioners' effort to elevate the status of their unexceptional claims of error by invoking the Due Process Clause of the Fifth Amendment is without any basis.

## ARGUMENT

### I. THE COURT SHOULD NOT GRANT CERTIORARI ON PETITIONERS' CLAIM THAT THE COURT OF APPEALS IMPOSED RULE 38 SANCTIONS IN VIOLATION OF THE DUE PROCESS CLAUSE.

#### A. The Due Process Issue Has Not Been Preserved by Petitioners.

Petitioners had ample opportunity to assert any objections that they may have had to the procedure employed by the Court of Appeals under Rule 38. The Court's letter of July 16, 1993, clearly set forth the procedure to be followed: The parties' letter briefs would be due within ten days. Petitioners would then have five days within which to submit a reply. Petitioners could have asserted a due process challenge to this procedure in their opening letter brief. Alternatively, they could have made a due process objection in their reply. Additionally, Petitioners could have filed a separate motion seeking revisions in the procedure established by

the July 16 letter in order to conform to the requirements of due process as viewed by Petitioners.

Nevertheless, Petitioners never contended that the procedure established by the Court of Appeals was defective under the Due Process Clause or in any other respect. Indeed, the only "objection" made by Petitioners was a request for a two-day enlargement of their time for reply, because Petitioners' counsel had scheduled a vacation at that time. Presumably, Petitioners do not contend that due process required the Court of Appeals to accommodate their counsel's vacation. The filing of the Motion for Enlargement of Time, however, reinforces the fact that Petitioners had the opportunity, in that motion and elsewhere, to set forth any constitutional or other defects in the procedure employed by the Court.[7]

It is fundamental that where parties, despite an opportunity to do so, fail to preserve an issue in a lower court, they may not raise the issue on certiorari. *See, e.g., EEOC v. Federal Lab. Relations Auth.*, 476 U.S. 19, 24 (1986); *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983). In the present case, any constitutional defects in the procedure employed by the Court of Appeals could have been timely asserted by Petitioners, in order to give the Court an opportunity to cure the defects, if any. Having failed to raise any

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[7] In addition, although the motion for an extension from August 2 to August 4 was denied, Petitioners nevertheless submitted on August 4 a supplement to their reply, adding a sentence that had been "inadvertently omitted." The additional sentence stated that Petitioners had intended to discuss at oral argument the two issues that they had not addressed in their brief. The Court of Appeals apparently accepted this supplement, since it quoted from the supplement in its opinion. *See* 8 F.3d at 144 (App. 7a). To this extent, Petitioners effectively obtained the two-day extension that they had requested.

such issue below, Petitioners are precluded from doing so before this Court.

**B. There Is No Basis for Petitioners' Due Process Argument.**

Even if Petitioners had preserved their due process claim, it would not merit review by this Court. There is no apparent conflict in the decisions of the lower courts on the application of Rule 38. To the contrary, the procedures used by the Third Circuit in this case were identical to those approved by other Courts of Appeals. These courts have specifically held that the requirements of due process are met where the appellant is given notice by the court that the appeal may be held frivolous under Rule 38 and is given the opportunity to respond. The appeal may be determined to be objectively frivolous without a formal evidentiary hearing. *See, e.g., Finch v. Hughes Aircraft Co.*, 926 F.2d 1574, 1583 (Fed. Cir. 1991); *Braley v. Campbell*, 832 F.2d 1504, 1513-15 (10th Cir. 1987) (en banc); *Hill v. Norfolk & W. Ry.*, 814 F.2d 1192, 1201-03 (7th Cir. 1987). Indeed, the procedures used by the Third Circuit were also identical to those employed by this Court in imposing damages under Supreme Court Rule 49.2, authorizing damages for a "frivolous" appeal or petition for certiorari. *See, e.g., Tatum v. Regents of Univ. of Neb. - Lincoln*, 462 U.S. 1117 (1983).

Nor do Petitioners present any important question under the Due Process Clause that requires intervention by this Court. Although Petitioners are certainly correct that they were entitled to notice and an opportunity to be heard, they were given that notice and opportunity by the July 16 letter of the Court of Appeals and their opportunity to file two letter briefs on the issue of whether Rule 38 damages should be imposed. Petitioners fail even to cite, much less address, the myriad of decisions holding the opportunity to submit one's position in writing to be sufficient under the Due Process

Clause. *See, e.g., Board of Curators of Univ. of Miss. v. Horowitz*, 435 U.S. 78 (1978) (review of written record, without oral hearing, sufficient in determining adequacy of student's proficiency); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (termination of disability benefits may be based on review of written medical records, without oral hearing).

Moreover, the Petition for Certiorari does not hint at any evidence or arguments that Petitioners would have submitted to the Court of Appeals if given the "opportunity" (other than the matters that Petitioners included in their two letter briefs on the Rule 38 issue). Petitioners do not refer to any evidence that they would have presented to the Court of Appeals at the hearing to which they now claim they were entitled. Indeed, Petitioners do not allege any prejudice whatsoever stemming from the alleged due process violation. As the Seventh Circuit has explained:

> Where, as in this and most Rule 38 cases, the conduct that is sought to be sanctioned consists of making objectively groundless legal arguments in briefs filed in this court, there are no issues that a hearing could illuminate. All the relevant "conduct" is laid out in the briefs themselves; neither the mental state of the attorney nor any other factual issue is pertinent to the imposition of sanctions for such conduct.

*Hill v. Norfolk & W. Ry.*, 814 F.2d 1192, 1201-02 (7th Cir. 1987).

Nor is there any substance to the contention that the five-day period for submitting a reply brief was legally insufficient. Even if it is assumed that the time period for filing a reply brief can in some contexts assume constitutional dimensions, Petitioners cannot claim under the circumstances of this case that they needed more than five days to reply to Respondents' letter brief. To the contrary, *all* of

the arguments in Respondents' letter brief regarding the frivolous nature of the appeal had already been presented in Respondents' brief on the merits of the appeal, filed on January 20, 1993. Petitioners thus had more than *six months*, not just five days, within which to evaluate Respondents' arguments.

The only new material in Respondents' letter brief (other than a general discussion of the "frivolous" standard established in Rule 38 decisions) was the documentation of the fees and costs incurred by Respondents' counsel. Had Petitioners needed more time to evaluate this documentation, they could have requested additional time to reply on that basis. Instead, as the Court of Appeals pointed out, 8 F.3d at 144 n.2 (Pet. 7a), Petitioners never challenged the accuracy of these fees and costs. Even now, in their Petition for Certiorari, Petitioners do not raise any factual issues, regarding Respondents' fees and costs or any other fact, that would require an evidentiary hearing.

Although Petitioners did not challenge this documentation, they did challenge the submission by one of Respondents' counsel of all of his fees and costs from the beginning of the case. Petitioners argued in their reply that any Rule 38 damages should be limited to the fees and costs incurred on the appeal. The Court of Appeals agreed. *Id.* (Pet. 7a). On this point, where Petitioners had something to say, they not only were given an opportunity to be heard, but *were* heard, and they prevailed on this issue.

Finally, Petitioners contend that the Court of Appeals erred in finding their appeal to be frivolous under Rule 38. This contention is not even arguably a question of due process, and it thus falls outside the scope of the statement of questions presented in the Petition for Certiorari. It therefore should not be considered by the Court. *See* Sup. Ct. R. 14.1(a). In any event, the contention

presents no significant issues of federal law that would justify review of the unanimous decision of a panel of the Court of Appeals.[8]

In short, Petitioners have not preserved any due process issue for review, nor is there any substance to their due process claim. Petitioners had a full opportunity to present -- and did present -- everything that they desired to submit in opposition to an award of damages under Rule 38. There is no reason for this Court to review a straightforward application of established principles under Rule 38 to the particular facts of this case.

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[8] For example, Petitioners' contention that the imposition of damages under Rule 38 requires a finding of bad faith is contrary to numerous consistent decisions of the Courts of Appeals that Rule 38 incorporates an *objective* standard of what is "frivolous." *See, e.g., Coghlan v. Starkey*, 852 F.2d 806, 808 (5th Cir. 1988); *Hill v. Norfolk & W. Ry.*, 814 F.2d 1192, 1202 (7th Cir. 1987); *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 64 (3d Cir. 1986). The cases cited by Petitioners for this proposition have nothing to do with Rule 38. *See Hall v. Cole*, 412 U.S. 1 (1973) (award of attorney fees under "common benefit" doctrine in suit to vindicate union members' free speech rights under Labor-Management Reporting and Disclosure Act of 1959); *Oglesby v. RCA Corp.*, 752 F.2d 272 (7th Cir. 1985) (award of attorney fees under 28 U.S.C. § 1927 for "unreasonably and vexatiously" multiplying the proceedings in a case).

Petitioners also contend that the two issues that they failed to address were not clearly articulated by the District Court. The Court of Appeals considered this contention and rejected it outright. 8 F.3d at 144 (Pet. 7a-8a.) Moreover, Petitioners' assertion that the District Court found issue preclusion on the negligence of Trustee but not that of his counsel is belied by the District Court's own opinion. (Pet. 31a (upholding "defendants' contention that further litigation concerning the conduct of the Trustee *and his counsel* . . . is precluded") (emphasis added); Pet. 37a ("[T]he defendants are correct in their contention that the primary liability issue in this case, *i.e.*, whether the Trustee *and/or his counsel* breached their duty of care to the Rimar estate . . . was decided in their favor in a prior action.") (emphasis added).)

## II. THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW PETITIONERS' CLAIM THAT THE COURT OF APPEALS ERRED IN AFFIRMING THE JUDGMENT OF THE DISTRICT COURT.

In addition to Petitioners' request to review the imposition of Rule 38 damages, the Petition for Certiorari also seeks, almost as an afterthought, that the Court review the decision of the Court of Appeals affirming the summary judgment granted by the District Court. This claim is nothing more than a set of contentions that the District Court erred on the merits of the legal issues presented. This Court does not sit as a court of errors to review such issues as the application of the Pennsylvania statute of limitations to a legal malpractice claim, or the application of established principles of issue preclusion to the particularly tortured history of litigation surrounding the Rimar bankruptcy. Petitioners claim no conflict of authority among the lower courts, nor do they even pretend that the issues presented are of special significance. Indeed, they do not even cite any legal authority in support of their contentions of legal error.

Nor does Petitioners' invocation of the Due Process Clause elevate this case to one meriting the Court's intervention. A due process violation is not established merely by a showing that errors of law were committed. *Roberts v. City of N.Y.*, 295 U.S. 264 (1935).

Finally, the issues raised by Petitioners -- whether their action was time-barred under the Pennsylvania statute of limitations, and whether prior determinations by the District Court precluded relitigation of the issue of whether Rimar had been damaged by Respondents' alleged failure to diligently pursue the claim against CCBL -- were not even reached by the Court of Appeals. To the

contrary, the judgment of the District Court was affirmed on the ground that the two *other* bases for that judgment -- that Petitioners were precluded from relitigating the issue of Respondents' negligence, and that Petitioners lacked standing to sue derivatively on behalf of a bankrupt corporation -- had been waived by Petitioners' failure to brief them before the Court of Appeals.

Accordingly, there is no reason for this Court to grant certiorari to review a routine application of established principles by the Court of Appeals.

## CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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